HIGH COURT OF ANDHRA PRADESH

* * * *

CIVIL MISCELLANEOUS APPEAL No. 623 of 2024

Between:

M/s.Brothers Engineering and Erectors Ltd.
Regd.Office at Chennai, rep.by Managing
Director P. Karunakaran Vasu and 2 others

.....APPELLANTS

AND

M/s. Zorin Infrastructure, LLP,
Kakinada, rep.by its Managing
Director Boddu Ajay

.....RESPONDENT

DATE OF JUDGMENT PRONOUNCED: **28.01.2025**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BLE SRI JUSTICE V. SRINIVAS

1.	Whether Reporters of Local newspapers may be allowed to see the Judgments?	Yes/No
2.	Whether the copies of judgment may be marked to Law Reporters/Journals	Yes/No
3.	Whether Your Lordships wish to see the fair copy of the Judgment?	Yes/No

_____

RAVI NATH TILHARI, J

_____

V. SRINIVAS, J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**
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.....RESPONDENT

! Counsel for the Appellants : Sri Varun Byreddy
&
Sri Sai Charan Chodisetty

Counsel for the Respondent : Ms. Lanka Sai Prasanthi

< Gist :

> Head Note:

? Cases Referred:

1. (2007) 3 SCC 686
2. (2023) 13 SCC 661
3. (2007) 5 SCC 28

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
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THE HON'BL SRI JUSTICE V. SRINIVAS

CIVIL MISCELLANEOUS APPEAL No. 623 of 2024

JUDGMENT: (per Hon'ble Sri Justice Ravi Nath Tilhari)

Heard Sri Varun Byreddy and Sri Sai Charan Chodisetty, learned counsels for the appellants and Ms. Lanka Sai Prasanthi, learned counsel for the respondent.

2. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'the Arbitration Act') has been filed by the appellants, the defendants Nos.1 to 3 in O.S.No.234 of 2015 in the Court of the VII Additional District Judge, Vijayawada. The respondent is the plaintiff. In the suit, the appellants filed I.A.No.21 of 2016 under Section 8 (1) of the Arbitration Act to refer the parties to arbitration. The said I.A. was rejected by Order dated 27.08.2024. Challenging the said Order, this appeal has been filed.

Facts:

3. The respondent filed the suit for recovery of money with subsequent interest. The transaction between the plaintiff and the defendants No.1 and 2 in O.S.No.234 of 201 was for execution of contract work for mechanical erection of three units of Turbine, Generator, Condenser, High Pressure Piping and connected works at KSK Mahanandi Power Plant, Akaltara, Jangir, Champa District, Chhattisgarh by the plaintiff. The agreement dated 02.08.2011 was

entered with agreed terms and conditions signed by the plaintiff and defendants 1 and 2, represented by the 3rd defendant.

4. The defendants/appellants filed I.A.No.21 of 2016 under Section 8 (1) of the Arbitration Act to refer the suit dispute along with I.A.No.383 of 2015 to an arbitrator as agreed under Clause No.17 of the agreement, dated 02.08.2011. It was stated that the agreement dated 02.08.2011 in Clause No.17 contained arbitration clause of compulsory reference of any dispute, but the plaintiff did not file the said agreement with the plaint. So, the plaintiff suppressed the arbitration clause fact. However, once the parties elected the special forum for arbitration and settlement of any dispute, the suit dispute could not be adjudicated by the Court. Clause No.17 of the agreement was comprehensive and covered any dispute. It was binding on the parties and so the request was made to refer the parties to the arbitration. The defendants did not file any written statement in the suit. The original agreement dated 02.08.2011 was in the custody of the plaintiff and a Xerox copy of that agreement was supplied to the defendants in response of the notice memo under Order 12 Rule 8 which was filed along with I.A.

5. The plaintiff/respondent filed objections/counter to the I.A, *inter alia* denying the averments of the I.A. It was stated that the statutory period of 90 days for filing counter and written statement had lapsed. Prior to the suit, the plaintiff issued legal notice to the defendants which was received and they also issued a reply notice, from which, it was clear that the defendants were liable to pay the amount to the plaintiff. The plaintiff further contended that Clause

No.17 of the agreement was confined to the execution of the work, but not for payment of the work. There was no dispute for payment of the suit amount, as such, there was no dispute to be referred to the arbitrator. The Court had got jurisdiction to try the suit and there was no need to refer the matter to the arbitrator. The I.A. was not maintainable and was liable to be dismissed with costs.

Judgment of the trial Court:

6. The learned trial Court framed the following point for consideration:

> "Whether the provisions of Section 8 (1) of the Act are applicable to the present suit and whether the parties are to be referred to Arbitration as prayed for."

7. The learned Court of VII Additional District Judge, Vijayawada dismissed the petition, by observing that the suit dispute was not with regard to any of the terms of the clauses in the agreement. The dispute in the suit was with regard to recovery of balance amount of Rs.40,22,561/- which was admittedly settled between the parties without intervention of any intermediary. He further observed that if there was any dispute with regard to settlement of that amount, with regard to any of the terms of 1 to 16 of the agreement, then it became the subject matter of the arbitration agreement covered by clause No.17 and then only the Court could refer the parties for arbitration under Section 8 of the Arbitration Act, but not otherwise. Simply because the dispute was raised with regard to payment of interest on the agreed amount, it could

not become an arbitral dispute between the parties and on that ground, the matter could not be referred to arbitration.

8. The learned Court of VII Additional District Judge, Vijayawada, by another Order dated 27.08.2024 forfeited the right to file written statement.

Submissions of learned counsel for appellants:

9. Learned counsel for the appellants referred to clause No.17 of the agreement dated 02.08.2011 and contended that the same was in wide terms. Under the said clause, any dispute that might arise in the future, shall be referred to an arbitrator or arbitrators chosen in mutual consent by both the parties. He submitted that the expression 'any dispute' is of the wider connotation and the dispute as raised in the suit was also covered. The learned trial Court legally erred in not referring the matter to the arbitrator and in rejecting the application, contrary to the provisions of Section 8, as also the legal position. He placed reliance in ***M/s. Agri Gold Exims Ltd. v. M/s.Sri Lakshmi Knits & Wovens***[1].

Submissions of learned counsel for respondent:

10. Learned counsel for the respondent submitted that the parties mutually agreed to settle their issues and the defendants agreed to pay totally a sum of Rs.70,22,561/- to the plaintiff towards the expenditure cost at the work site. Out of the said amount, the defendants paid Rs.30 lakh in different installments. For the balance amount out of the agreed amount, the suit was filed, when the same was not paid, also claiming the interest thereon. She

[1] (2007) 3 SCC 686

submitted that, thus, the subject matter does not fall within the expression 'any dispute' under the agreement, once it was mutually settled. She further submitted that as the amount to be refunded was settled between the parties mutually, the arbitration agreement stood closed. Learned counsel for the respondent, referred to the judgment of the Hon'ble Apex Court in ***Emaar India Ltd. v. Tarun Aggarwal Projects LLP***[2].

Consideration:

11. We have considered the aforesaid submissions and perused the material on record.

12. The following point arises for our consideration and determination:

> "Whether the impugned Order dated 27.08.2024 rejecting I.A.No.21 of 2016 is legal and valid?"

Point:

13. Learned counsel for the plaintiff/respondent submitted that the clause No.17 of the agreement was confined to the execution of the work and not for the payment of amount for the said work. Learned counsel for the appellants submitted that the payment of amount would arise only under the agreement and so non-payment of amount would be only for not fulfilling the contractual obligations in terms of the agreement and thus, arbitration clause was comprehensive to cover the dispute under the agreement dated 02.08.2011 including the suit dispute. The submission of the learned counsel for the respondent was that the sum claimed for which the suit had been filed

[2] (2023) 13 SCC 661

was not covered by the arbitration clause and so, the suit was maintainable and the matter was not referable to the arbitration.

14. Section 8 of the Arbitration and Conciliation Act, 1996 reads as under:

> **"8. Power to refer parties to arbitration where there is an arbitration agreement.**
>
> [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.] *[Substituted by Act No. 3 of 2016 dated 31.12.2015.]*
>
> (2)The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.] *[Inserted by Act No. 3 of 2016 dated 31.12.2015.]*
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

15. Clause No.17 of the agreement dated 02.08.2011 is as under:

> "17. It is agreed by both the parties that any disputes that may arise in the future shall be referred to an arbitrator or arbitrators chosen in mutual consent by both the parties and shall be in accordance with the provisions of the Arbitration and Reconciliation Act as applicable in Andhra Pradesh and the jurisdiction of the disputes shall be within the jurisdiction of the Vijayawada civil courts alone."

16. In ***Emaar India Ltd.*** (supra), the question was whether in the facts and circumstances of the case, the High Court was justified in appointing the arbitrators in an application under Sections 11(5) and (6) of the Arbitration Act without holding any preliminary inquiry or inquiry on whether the dispute is arbitrable or not?

17. In ***Emaar India Ltd.*** (supra), the facts were that the respondents therein approached the High Court for appointment of the arbitrators in terms of Clause 37 of the Addendum Agreement by submitting an application under Section 11 (5) & (6) of the Arbitration Act seeking appointment of arbitrators by the Court. The said arbitration petition was opposed by the opponent by raising various objections including one that the dispute fell under Clause 36 of the Addendum Agreement and not under Clause 37 which incorporated arbitration clause. Clause 36 of the Addendum Agreement stipulated that in the event of any dispute as mentioned with regard to Clauses 3, 6 and 9, other party shall have a right to get the agreement specifically enforced through appropriate Court of law. As per Clause 37, save and except Clause 36, all or any dispute arising out of or touching upon or in relation to the terms of the addendum agreement, shall be settled through, under the provisions of the

Arbitration and Conciliation Act, 1996. So, with respect to any dispute as mentioned in Clauses 3, 6 and 9, such disputes were not arbitrable at all. The Hon'ble Apex Court observed that considering the Clauses 36 and 37 of the agreement and when a specific plea was taken that the dispute fell within Clause 36 and not under Clause 37, therefore, the dispute was not arbitrable. The High Court was at least required to hold a primary inquiry/review and to *prima facie* come to conclusion on whether the dispute fell under Clause 36 or not and whether the dispute was arbitrable or not. Without holding such primary inquiry and despite having observed that a party did have a right to seek enforcement of agreement before the court of law as per Clause 36, thereafter, had appointed the arbitrators by solely observing that the same did not bar settlement of disputes through the Arbitration and Conciliation Act, 1996.

18. Paragraphs No.22 & 23 of ***Emaar India Ltd.*** (supra) read as under:

> "**22.** Applying the law laid down by this Court in the aforesaid decisions and considering Clauses 36 and 37 of the agreement and when a specific plea was taken that the dispute falls within Clause 36 and not under Clause 37 and therefore, the dispute is not arbitrable, the High Court was at least required to hold a primary inquiry/review and prima facie come to conclusion on whether the dispute falls under Clause 36 or not and whether the dispute is arbitrable or not. Without holding such primary inquiry and despite having observed that a party does have a right to seek enforcement of agreement before the court of law as per Clause 36, thereafter, has appointed the arbitrators by solely observing that the same does not bar settlement of disputes through the Arbitration and Conciliation Act, 1996. However, the High Court has not appreciated and considered the fact that in case of dispute as mentioned in

Clauses 3, 6 and 9 for enforcement of the agreement, the dispute is not arbitrable at all. In that view of the matter, the impugned judgment and order passed by the High Court appointing the arbitrators is unsustainable and the same deserves to be quashed and set aside.

23. However, at the same time, as the High Court has not held any preliminary inquiry on whether the dispute is arbitrable or not and/or whether the dispute falls under Clause 36 or not, we deem it proper to remit the matter to the High Court to hold a preliminary inquiry on the aforesaid in light of the observations made by this Court in *Vidya Drolia* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] and in *Indian Oil Corpn.* [*Indian Oil Corpn. Ltd.* v. *NCC Ltd.*, (2023) 2 SCC 539 : (2023) 1 SCC (Civ) 88] and the observations made hereinabove and thereafter, pass an appropriate order."

19. In ***Emaar India Ltd.*** (supra) the Hon'ble Apex Court reiterated on the question who decides on non-arbitrability of 'the dispute', held that the scope of the judicial review and jurisdiction of the Court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted. It was observed that the general rule and principle is that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The Court has been conferred the power of 'second look' on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34 (2) (a) or sub-clause (i) of Section 34 (2) (b) of the Arbitration Act. However, rarely, as a demurrer the Court may interfere at the Section 8 or Section 11 stage, when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the

level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

20. Paras-18, 19 & 20 of ***Emaar India Ltd.*** (supra) are reproduced as under:

> "**18.** After referring to and considering in detail the earlier decisions on the point, more particularly, with respect to non-arbitrability and the "excepted matters", it is ultimately concluded in para 76 as under : (*Vidya Drolia case* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 72)
>
> "*76.* In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:
>
> *76.1.* (*1*) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (*2*) When cause of action and subject-matter of the dispute affects third-party rights; have *erga omnes* effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (*3*) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4. (*4*) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan* [*Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*, (1999) 5 SCC 651] : (SCC p. 669, para 35)

'*35*. … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir* v. *Leeman* [*Keir* v. *Leeman*, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (*Soilleux* v. *Herbst* [*Soilleux* v. *Herbst*, (1801) 2 Bos & Pul 445 : 126 ER 1376] , *Wilson* v. *Wilson* [*Wilson* v. *Wilson*, (1848) 1 HL Cas 538] and *Cahill* v. *Cahill* [*Cahill* v. *Cahill*, (1883) LR 8 AC 420 (HL)]).' "

19. On the question, who decides on non-arbitrability of the dispute, after referring to and considering the earlier decisions on the point, more particularly, the decisions in *Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions &*

Engg. Ltd. [*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , *United India Insurance Co. Ltd.* v. *Hyundai Engg. & Construction Co. Ltd.* [*United India Insurance Co. Ltd.* v. *Hyundai Engg. & Construction Co. Ltd.*, (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] and *Narbheram Power & Steel* [*Oriental Insurance Co. Ltd.* v. *Narbheram Power & Steel (P) Ltd.*, (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] , it is observed and held in *Vidya Drolia case* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] that the question of non-arbitrability relating to the inquiry, whether the dispute was governed by the arbitration clause, can be examined by the courts at the reference stage itself and may not be left unanswered, to be examined and decided by the Arbitral Tribunal. Thereafter, in para 153, it is observed and held that the expression, "existence of arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the reference stage would apply the prima facie test. It is further observed that in cases of debatable and disputable facts and, good reasonably arguable case, etc. the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

20. Ultimately in para 154, the proposition of law is crystallised as under : (*Vidya Drolia case* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 121)

"*154*. Discussion under the heading "*Who decides Arbitrability*?" can be crystallised as under:

154.1. Ratio of the decision in *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (*i*), (*ii*) or (*iv*) of Section 34(2)(*a*) or sub-clause (*i*) of Section 34(2)(*b*) of the Arbitration Act.

154.3. Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

21. We are of the considered view that in view of the law as laid down by the Hon'ble Apex Court in ***Emaar India Ltd.*** (supra) that, there is no dispute on the proposition of law that before passing the Order under Section 8 (1) of the Arbitration Act, the Court has to satisfy if the dispute is arbitrable or not, and if it is arbitrable, the matter is to be referred to the arbitrator, and in order to find out if the arbitration clause is attracted, it is to be found from the

pleadings, as also the terms of the agreement, if the dispute is covered under particular clause providing for reference to the arbitrator.

22. The dispute may arise out of the agreement and certainly when there is an agreement, the dispute would be either in relation to subject of the agreement or because of such subject.

23. The learned trial Court looked into the terms and conditions of the agreement, clause by clause, 11 to 16. It also considered the plaint pleadings and observed that as per the plaint pleadings, *inter alia,* the agreement was for execution of the work mentioned in the agreement. The plaintiff commenced the work in July 2011, but the work was taken over by the defendant company by forcing the plaintiff out of site and the plaintiff left all the procured equipment at the place of work at the request of the defendant company so that they could continue the work. The plaintiff's case was that it spent Rs.70,22,561/- from July, 2011 to October, 2011 as per the agreement to perform the work of the defendant company. The defendants were satisfied with the work executed by the plaintiff and the machinery purchased for the execution of the work and left at work spot. The details of the expenses were also submitted to the defendant company in the meeting held on 02.02.2012 and 07.02.2012. The defendants accepted the expenses vide e-mail communication dated 21.02.2012 and agreed to pay back the amount in full and paid Rs.5 lakh each on six different dates and in all Rs.30 lakh. The further case of the plaintiff was that he gave legal notice dated 27.12.2014 for the balance amount to pay Rs.40,22,561/- with accrued interest, to which the

defendants also replied and they admitted the contents of the legal notice and to pay total amount of Rs.70,22,561/-, admitting the payment of Rs.30 lakh. Learned trial Court observed that the defendants though did not file written statement, but filed written arguments admitting the reply notice dated 03.01.2015 by them in response of the notice of the plaintiff dated 22.12.2014. The defendants also admitted about the mutual agreement between the plaintiff and the defendant company to settle their issues and the defendant company agreed to pay Rs.70,22,561/- to the plaintiff towards the expenditure cost and made payment of Rs.30 lakh in different installments. They admitted about the e-mail dated 29.12.2013 assuring to settle the total dues within 7 or 8 months, but stated that as the two units work was not completed, the company was not in a position to pay Rs.40,22,561/- and they were not liable to pay any interest as they never promised to pay the interest and it is only an agreement to reimburse the expenditure to maintain cordial relationship. The learned trial Court on consideration found that such dispute as raised in the suit was not covered by Clauses 1 to 16 of the agreement. The dispute was with regard to the recovery of balance amount of Rs.40,22,61/- which admittedly was settled between the parties. So, the plaintiff could maintain the suit.

24. Paragraph Nos.44 and 45 of the judgment of the learned trial Court are as under:

> "44. In the written arguments the defendants are admitting the reply notice dated 3.1.2015 by them in response to the notice of the plaintiff dated 27.12.2014. It is admitted in the reply notice that the defendant company has taken over the work site being frustrated over the poor performance of the

plaintiff and completed one unit at the worksite out of three units which were to be completed by the plaintiff as per the agreement and stated that the plaintiff could not fulfill the contractual obligation but the defendants did not initiate any legal proceedings against the plaintiff to maintain cordial relationship and maintain the brand name of the defendant company. **The defendants admitted about the mutual agreement between the plaintiff and defendants company to settle their issues and the defendant company agreeing to Rs.70,22,561/- to the plaintiff towards the expenditure cause and made payment of Rs.30 lakhs in different installments by obtaining hand loans with friends and relatives as they could not receive payment from SEPCO for the work done. The defendants admitted about the email dated 29.12.2013 assuring to settle the total dues within seven or eight months but stated as the two units work was not completed yet the company was not in a position to pay Rs.40,22,561/- and that they are not liable to pay any interest as they never promised to pay interest and it is only an agreement to reimburse the expenditure to maintain cordial relationship.** They stated that the question of reimbursement of expenditure would arise only after completion of balance two units when they would get payment from SEPCO and the said fact was informed to the plaintiff stating that they would make payment periodically.

45. So, the defendant company agreed to pay Rs.70,22,561/- for settlement of the issues between the parties and paid Rs.30 lakhs and are admitting the due claimed in the suit for Rs.40,22,561/-. They are raising dispute with regard to interest payable on that amount as demanded by the plaintiff and also are claiming that they can make payment only after the completion of the work and receipt of payment from the principal SEPCO."

25. A perusal of the affidavit filed by the defendants/appellants in support of the I.A.No.21 of 2016 shows that it has not been specifically stated that the dispute in the suit falls in which clause of the agreement. They stated simply that there was an arbitration clause in the agreement being Clause No.17, and it mentioned any dispute, which was comprehensive and covered

any dispute. So, the dispute as arisen in the plaint in O.S.No.234 of 2015 was also covered under such wider term and the parties should be referred to the arbitrator under Section 8 (1) of the Arbitration Act.

26. The same was the argument before us also by the appellants' counsel that 'any dispute' is of wider connotation and it would cover the dispute of the nature as raised in the suit. But, under which clause of the agreement the dispute is covered was not specifically stated before us as well.

27. In the present case of suit for the recovery of money, balance of the amount may be because of the agreement, but the question is whether such dispute for recovery of the balance of the amount is a dispute which is covered under Clause No.17. Though the Clause No.17 is comprehensively worded so as to include any dispute, but the question is whether there is any arbitrable dispute. The plaintiff's case is that it was mutually agreed that the defendants shall pay Rs.70,22,561/-, out which Rs.30 lakh was also paid on six different dates for Rs.5 lakh each on every date. The plaintiff had also issued notice. It was also replied vide the e-mails which find mention in the plaint. The defendant has not filed any written statement disputing the same. Even, in the present appeal nowhere it has been stated as to under which clause the dispute falls. It has also not been argued that there was no mutual agreement for payment of the specified amount as mentioned in the plaint. It has also not been disputed in the grounds of the memo nor argued before the Court as mentioned in the order based on written arguments filed before the Court that, the defendants admitted reply notice dated 03.01.2015 by them in response to

the notice of the plaintiff dated 27.12.2014 and admitted in the reply notice that the defendant company had taken over the work being frustrated over the poor performance of the plaintiff who had completed one unit work at the work site, out of three units which were to be completed by the plaintiff as per the agreement. In the written arguments they admitted about the mutual agreement between the plaintiff and the defendant company to settle their issues and the defendant company agreeing to pay Rs.70,22,561/- to the plaintiff towards expenditure cost and also made payment of Rs.30 lakh out of settled amount in different installments. The defendants also admitted about e-mail dated 29.12.2013.

28. In ***M/s. Agri Gold Exims Ltd.*** (supra), the Andhra Pradesh High Court passed the Order directing the parties to take recourse to the provisions of the Arbitration and Conciliation Act, opining that the suit filed by the appellant therein was not maintainable. In the said case, there was Memorandum of Understanding dated 08.05.2002 in relation to the business of export. The said Memorandum of Understanding contained the expression "in case of any dispute between the two parties, the same shall be referred to Arbitration……". The disputes and differences arose, the suit was filed for recovery of amount after dishonor of the cheques, which were sent. The application praying for reference of the dispute to the arbitration was rejected, opining that no dispute existed between the parties for reference to an arbitration. On revision, the High Court allowed the application by reversing the Order of the District Court. The Hon'ble Apex Court observed that the

arbitration agreement entered into by and between the parties was of wide amplitude. The arbitration agreement brought within its fold dispute of any nature whatsoever. It was in broadest term. In the said case, the respondents had made payments without prejudice to their rights and contentions. The payments were made keeping in view the ongoing business relationship between the parties. Out of the five post dated cheques, two were dishonoured. But, despite the pendency of the suit, payments had been made to satisfy the claim of the appellant therein in respect of the cheques which were dishonoured. Sufficient explanation had been offered by the respondents therefor. Certain contingencies of events as indicated were not in dispute. The Hon'ble Apex Court observed that if the suit was confined to the amount in respect of those two cheques, the contention could have been accepted that the respondents therein had accepted their liabilities and therefore, it could not be said that there existed a dispute between the parties within the meaning of Clause 20 of the Memorandum of Understanding, as covered therein. The Hon'ble Apex Court observed that the appellant's claim was not confined to the question regarding non-payment of the amount under two dishonoured cheques. Thus, there existed a dispute between the parties. Had the dispute between the parties been confined thereto only, the same had come to an end.

29. Paragraphs No.15 to 22 of ***M/s. Agri Gold Exims Ltd.*** (supra) are reproduced as under:

"**15.** Difference between Section 34 of the Arbitration Act, 1940 and Section 8 of the 1996 Act is distinct and apparent. Section 8 of the 1996 Act makes a

radical departure from Section 34 of the 1940 Act. The 1996 Act was enacted in the light of UNCITRAL Model Rules.

16. We need not dilate on this issue as this aspect of the matter has been considered by this Court in *Rashtriya Ispat Nigam Ltd.* v. *Verma Transport Co.* [(2006) 7 SCC 275 : (2006) 7 Scale 565] wherein this Court noticed: (SCC pp. 285-86, paras 24-25)

"*24*. Section 34 of the repealed 1940 Act employs the expression 'steps in the proceedings'. Only in terms of Section 21 of the 1940 Act, the dispute could be referred to arbitration provided the parties thereto agreed. Under the 1940 Act, the suit was not barred. The court would not automatically refer the dispute to an Arbitral Tribunal. In the event, it having arrived at a satisfaction that there is no sufficient reason that the dispute should not be referred and no step in relation thereto was taken by the applicant, it could stay the suit.

25. Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Whereas Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. (See O.P. Malhotra's *The Law and Practice of Arbitration and Conciliation*, 2nd Edn., pp. 346-47.)"

17. The respondents had not filed any written statement in the suit. They had not disclosed their defence. They indisputably had raised a dispute in regard to the claim of the appellant. We have noticed the arbitration agreement entered into by and between the parties. It is of wide amplitude. The arbitration agreement brings within its fold dispute of any nature whatsoever. It is in broadest term. The respondents had made payments without prejudice to their rights and contentions. Payments were made keeping in view the ongoing business relationship between the parties. Out of the five post-dated cheques, two were dishonoured. But, despite pendency of the suit, payments had been made to satisfy the claim of the appellant in respect of the cheques which were

dishonoured. Sufficient explanation has been offered by the respondents therefor. Certain contingencies of events, as indicated hereinbefore, are not in dispute. If the suit was confined to the amount in respect of those two cheques, the contention of Mr Rao could have been accepted. But it is not so.

18. The term "dispute" must be given its general meaning under the 1996 Act.

19. In P. Ramanatha Aiyar's *Advanced Law Lexicon*, 3rd Edn., p. 1431, it is stated:

"In the context of an arbitration the words 'disputes' and 'differences' should be given their ordinary meanings. Because one man could be said to be indisputably right and the other indisputably wrong, that did not necessarily mean that there had never been any dispute between them…."

20. Admittedly, the appellant's claim is not confined to the question regarding non-payment of the amount under the two dishonoured cheques. Thus, there existed a dispute between the parties. Had the dispute between the parties been confined thereto only, the same had come to an end.

21. The appellant evidently has taken before us an inconsistent stand. If he was satisfied with the payment of the said demand drafts, he need not pursue the suit. It could have said so explicitly before the High Court. It cannot, therefore, be permitted to approbate and reprobate.

22. Section 8 of the 1996 Act is peremptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. (See *Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums* [(2003) 6 SCC 503] and *Rashtriya Ispat Nigam Ltd.* [(2006) 7 SCC 275 : (2006) 7 Scale 565]) No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration."

30. From the aforesaid judgment in ***M/s. Agri Gold Exims Ltd.*** (supra), it is evident that if the dispute was confined only to the amount of two

cheques which were issued but were dishonoured, there would have been no dispute, within the meaning of 'dispute' under arbitration clause. But, since the dispute was not confined to the amount in respect of those two cheques, the contention was not accepted, as there was dispute with respect to the other amount as well. In the present case applying the said principle, once it was mutually agreed that a particular amount would be given to the plaintiff and out of the said amount, Rs.30 lakhs was paid and the remaining amount of Rs.40 lakh and odd could not be paid for the reason as disclosed by the defendants in the written arguments and their reply to the notice of the plaintiff, there would be no dispute so as to be covered under the expression 'any dispute' under Clause 17 of the arbitration agreement. It has not been argued before us that with respect to the mutually agreed amount, also that in case of any dispute, the same arbitration clause in the arbitration agreement would get attracted nor that the plaintiff's notice, the reply contained any arbitration clause, with respect to any dispute for the mutually agreed amount as well. In our view, the subject matter of the suit is not a dispute so as to be covered under the agreement for being referred to the arbitration.

31. In ***Punjab State v. Dina Nath***[3] while considering the words "any dispute" appearing in clause 4 of the Work Order therein, the Hon'ble Apex Court observed that the use of the words, "any dispute" in clause 4 of the Work Order is wide enough to include all disputes relating to the said Work Order, therefore, when a party raises a dispute for non-payment of money after

[3] (2007) 5 SCC 28

completion of the work, which is denied by the other party, such a dispute would come within the meaning of 'arbitration agreement' between the parties.

32. In the present case, the non-payment of the money, which was mutually agreed, as aforesaid, as also the mutually agreed amount is not disputed nor denied and therefore, we are of the view that the subject matter of the suit would not come within the meaning of 'arbitration agreement' between the parties.

33. The expression 'any dispute', though may be very wide but the dispute must relate to the subject and covered under the arbitration agreement. In the present case, the dispute was mutually resolved as it was mutually agreed, for payment of certain amount, out of which, part of the amount had been paid. The suit was filed for the remaining amount which was settled between the parties, on which point there is no dispute. In our view, the subject matter of the suit, therefore, is non-arbitrable under the agreement.

34. So far as the aspect of interest is concerned, any clause could not be pointed out with respect to the interest. The interest the plaintiff claimed is for non-payment of part of the admitted amount/mutually agreed amount. Consequently, the suit for interest is also not arbitrable under the agreement.

35. We do not find any illegality in the order of the learned trial Court on the aforesaid aspect.

36. However, we find force in one submission that by the Order of the same date 27.08.2024, the right of the appellants to file written statement could not be forfeited, as they did not file any written statement within the time

provided by Code of Civil Procedure which expired long back to 30.11.2015, i.e., after the lapse of the statutory period under Code of Civil Procedure.

37. We are of the view that after rejection of I.A.No.21 of 2016 to refer the parties to arbitration, the learned trial Court ought to have considered the aspect whether the defendants/appellants were to be granted time to file written statement or their right was to be forfeited, after affording opportunity of hearing to them. From perusal of the order of forfeiture of filing of the written statement, it appears that it was because of the rejection of I.A.No.21 of 2016 that, the right to file the written statement has also been forfeited on the same date. We are of the view that with respect to that right, the learned trial Court ought to have passed separate order, in accordance with law, considering the provisions on the point of filing of the written statement and its forfeiture, also, keeping a view that the procedural law is handmaid of justice and the Court has the power to extend the time for filing of the written statement in the facts and circumstances of each and every case. Simply because the application was rejected, it could not be that on the same date the right to file written statement was also forfeited.

38. The Order dated 27.08.2024 passed in I.A.No.21 of 2016 rejecting the application is maintained.

39. However, the Docket Order dated 27.08.2024 passed in the suit forfeiting the right to file written statement cannot be sustained. The learned trial Court shall consider the aspect of filing of the written statement by the

appellants/defendants afresh, if an application to that effect is filed before the learned Court.

40. The Civil Miscellaneous Appeal is dismissed, but with the aforesaid observations and directions. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

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RAVI NATH TILHARI, J

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V. SRINIVAS, J

Date: 28.01.2025
Dsr

Note
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